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June 10, 1998

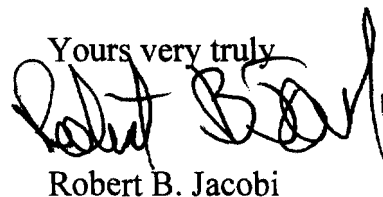
VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Dear Ms. Salas

On behalf of Channel 51 of San Diego, Inc., licensee of television station KUSI, San Diego, California, there is herewith transmitted an original and five copies of its Reply of Channel 51 of San Diego, Inc. to KRPA-TV Opposition to Channel 51 Petition for Reconsideration.

Yours very truly



Robert B. Jacobi

RBJ:btc

Enclosures

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JUN 10 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

In the Matter)
)
Advanced Television Systems and their)
Impact Upon the Existing Television)
Broadcast Service)

MM Docket No. 87-268

TO: The Commission

REPLY OF CHANNEL 51 OF SAN DIEGO, INC. TO KRPA-TV OPPOSITION TO CHANNEL 51 PETITION FOR RECONSIDERATION

Channel 51 of San Diego, Inc., Licensee of Television Station KUSI-TV, San Diego, California (hereinafter Channel 51) filed a Petition for Reconsideration in the above-referenced Docket proceeding urging that the Commission reconsider and delete the allocation of DTV Channel 51 to Rancho Palos Verdes Broadcasters, Inc., permittee of analog station KRPA-TV, Rancho Palos Verdes, California (hereinafter RPVB).

The primary thrust of the Channel 51 Petition for Reconsideration was based on the fact that RPVB does not have a transmitter site for either an analog or DTV operation. RPVB timely filed an "Opposition" which asserts that Section 336 of Telecommunications Act of 1996 mandates the Federal Communications Commission (FCC) to allocate a DTV channel to all licensees and permittees and that RPVB is a permittee. Channel 51, by and through its counsel, respectfully submits its Reply to the RPVB Opposition.

1. Section 336 defines "initial eligibility" in terms of identifying those entities entitled to receive a DTV license; Section 336 neither mandates issuance of DTV licenses nor deprives the Commission of the discretion to determine among licensees and permittees who will receive a DTV license. That RPVB is a permittee and, therefore, eligible to receive a DTV allotment is not disputed.

2. The issuance of a construction permit (giving rise to the term "permittee") presumes reasonable assurance of the availability of a transmitter site. The allocation of DTV Channel 51 to RPVB quite obviously was based upon the aforesaid presumption. The facts, however, refute the presumption, as follows:

- A. RPVB did not have a transmitter site when it filed its application in 1983;
- B. RPVB did not have a transmitter site when it received a construction permit in 1985;
- C. RPVB did not have a transmitter site in April, 1997--at the time that the FCC released the Sixth Report and Order;
- D. RPVB did not have a transmitter site in February, 1998--the date the Commission issued its Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order;
- E. RPVB did not have a transmitter site on April 29, 1998--the date that it filed an amendment to its pending application for extension of time to complete construction;
- F. RPVB did not have a transmitter site at any of the 13 times (encompassing 10 years) that it filed extension applications;
- G. RPVB did not have a transmitter site on May 11, 1998--the date that it filed its application for modification of construction permit.

3. Presumably, the Commission has granted extensions of the construction permit on the basis of reasonable assurance of the availability of a transmitter site. The April 29, 1998 amendment referenced above alludes to "extensive negotiations with Pacific Bell" for a transmitter site and includes a copy of an unexecuted draft document entitled "License and Consent Agreement" (hereinafter Agreement). The amendment also reflects the following:

- A. The Agreement between Pacific Bell and RPVB (if ever executed) is subject to the approval of the Santa Catalina Conservancy;
- B. The Agreement (if ever executed) is subject to the consent of the California Public Utilities Commission;
- C. The Agreement (if ever executed) is subject to the consent of the County of Los Angeles and the issuance of a required conditional use permit.

4. While not referenced in the April 29 Amendment, the Agreement (if ever executed) is also subject to the following:

- A. A further and separate consent from another department of the County of Los Angeles which would have to approve RPVB as a co-tenant;
- B. The approval of the California Coastal Commission. The third, fourth and fifth applications for extension of construction permit all referenced the filing of an application for a development permit with the California Coastal Commission. Other than then reference to the filing of a development permit application, the status of that application has never been reflected in subsequent extension applications.

5. The filing of unexecuted agreements, allegations of discussions, allegations of extensive negotiations, have been and continue to be convenient ploys utilized to convince the Commission that RPVB has "reasonable assurance." These time-worn ploys(the unexecuted Agreement, the same verbiage) reappear in the April 29, 1998 amendment. Establishing "reasonable assurance," however, requires more than vague self-serving statements. Numerous regulatory consents/approvals are required as a condition precedent to RPVB's use of the site proposed in the draft agreement. RPVB has not provided information as to the dates of these "discussions"/"negotiations;"^{1/} the nature and substance of these discussions/negotiation—i.e., formal meetings, telephone inquiries or whatever; the names and titles of the persons with whom the contacts were made; the current status as to obtaining these several regulatory consents/approvals; a timetable as to when construction will be completed and operation commenced.

6. Permittee's diligence is also a critical factor in evaluating "reasonable assurance." The Modification of Construction Permit Application filed on May 11, 1998 reflects Linda Rankin as the name of the person who provided reasonable assurance of the transmitter site. Ms. Rankin is an employee of Pacific Bell and holds the title of Real Property Manager. In a telephone conversation with Ms. Rankin on or about June 8, 1998, Ms. Rankin stated that there is no executed agreement as of the current date, that there have been negotiations between Pacific Bell and RPVB, that changes in the Agreement requested by Pacific Bell were sent to RPVB in 1997 and that Ms. Rankin has not heard

^{1/} Based on the information provided by RPVB, these discussions/negotiations could have occurred anytime between 1983 and 1998.

from RPVB since October, 1997. The Chief Administrative Office of the County of Los Angeles is unaware of any negotiations between the County of Los Angeles and RPVB-- though it is possible that RPVB may have spoken with someone concerning the matter.

7. The information provided to the FCC in the April 29, 1998 amendment could have been filed in 1997 and the failure to do so manifests a lack of diligence. The modification application filed on May 11, 1998 is nothing more than a thinly disguised effort to re-focus FCC attention away from the pending extension application and to prolong a construction permit which should have been terminated long ago. Thirteen years and thirteen extension applications, without more, should be sufficient evidence to conclude that "reasonable assurance" for a transmitter site is lacking.

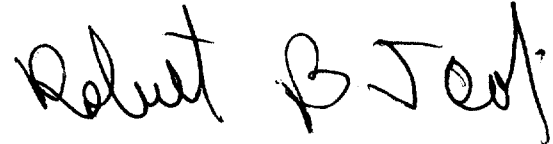
8. Channel 51 is not challenging the eligibility of RPVB to receive a DTV allotment. The record, however, reflects that RPVB never had a transmitter site for its analog facility and has never provided evidence of reasonable assurance of the availability of a transmitter site for a DTV transmitter site. Absent reasonable assurance, the FCC is entitled to use its discretion as to the awarding of a DTV allotment to RPVB. FCC discretion based on the facts as provided by RPVB (or the lack thereof) and on long

standing Commission policy governing spectrum efficiency compels that the allotment of DTV Channel 51 to RPVB be deleted.

Respectfully Submitted

CHANNEL 51 OF SAN DIEGO, CALIFORNIA, INC.

BY:

A handwritten signature in black ink, appearing to read "Robert B. Jacobi", written over a horizontal line.

ROBERT B. JACOBI
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CERTIFICATE OF SERVICE

I, Brenda Chapman, hereby certify that on this 10th day of May, 1998, true and correct copies of the foregoing REPLY OF CHANNEL 51 OF SAN DIEGO, INC. TO KRPA-TV OPPOSITION TO CHANNEL 51 PETITION FOR RECONSIDERATION were mailed first-class, postage prepared, to the following:

Barry A. Friedman
Thompson Hines & Flory, LLP
Suite 800
1920 N Street, N.W.
Washington, D.C. 20036

Clay Pendarvis
Chief, Television Branch
Federal Communications Commission
1919 M Street, N.W., Room 700
Washington, D.C. 20554


Brenda Chapman